# Petition

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No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

VERONICA YUEN,

*Petitioner,*

—v.—

INTERNAL REVENUE SERVICE, et al.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## QUESTIONS PRESENTED

1. Whether the Second Circuit's narrow interpretation of the provision "A person who owes allegiance to the United States" in the Appropriations Act, 31 U.S.C. § 699b, which prohibits federal employment of a majority of aliens, conflicts with this Court's decision in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)?

2. Whether the Appropriations Act, 31 U.S.C. § 699b, invidiously discriminates against some aliens over others on the basis of national origin, in violation of the Fifth Amendment?

## LIST OF THE PARTIES

The petitioner, plaintiff-appellant below, is VERONICA YUEN.

The respondents, defendants-appellees below, are the INTERNAL REVENUE SERVICE; GEROME KURTZ, in his capacity as Commissioner of the Internal Revenue Service; JOHN IMBESI, JOSEPH TRAGNA, H. KRAMER and CAROLE BUTLER, in their official capacities as agents/employees of the Internal Revenue Service.

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, No. 80-6206 (2d Cir. May 21, 1981), not yet reported, is attached hereto as Appendix A. The opinion of the United States District Court for the Southern District of New York, reported at 497 F. Supp. 1023 (S.D.N.Y. 1980), is attached hereto as Appendix B.

## JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on May 21, 1981. This petition for certiorari was filed within ninety days of that date, as required by 28 U.S.C. § 2101(c) and Rule 20.2 of the Supreme Court Rules. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

31 U.S.C. § 699b (1981 Supp.), codifying Pub. L. No. 96-74, Title VI, § 602:

> Unless otherwise specified during the current fiscal year no part of any appropriation shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on September 29, 1979, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, (4) is an alien from Cuba, Poland, South Vietnam, or the Baltic countries lawfully admitted to the United States for permanent residence, or (5) South Vietnamese, Cambodian and Laotian refugees paroled into the United States between January 1, 1975, and September 29, 1979: Provided, That for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with: Provided further That any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both: Provided further, That the above penal-clause shall be in addition to, and not in substitution for any other provisions of existing law: Provided further, That any payment made to any officer or employee contrary to the provisions of this

section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of Israel, the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

## STATEMENT OF THE CASE

Petitioner Veronica Yuen was born in China and is an alien lawfully admitted for permanent residence in the United States. In April 1980, while completing her second year at Brooklyn Law School, petitioner applied for a GS-7 excepted civil service position*/ as a legal research assistant in the Appeals Office of the Internal Revenue Service [hereinafter "IRS"], located in New York City. Her duties were to assist Appeals Officers in researching tax issues and other case-related technical support activities. Although the

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*/ Excepted civil service positions are those which are not filled by competitive examination. 5 C.F.R. § 213.3101(a).

job advertisement did not state that aliens were barred from employment, petitioner disclosed her lawful permanent resident status both in her application and at the employment interview.

On May 29, 1980, John Imbesi, Associate Chief of the New York City Appeals Office of the IRS, orally offered petitioner the position, to begin June 2, 1980. She was to work full time during the summer and part time during her third academic year. Petitioner obtained a release from a prior employment commitment, called Mr. Imbesi and accepted the offer. Later that day, an IRS representative called and left word that the offer was rescinded because petitioner was not a United States citizen. The IRS's sole basis for withdrawing her employment offer was section 699b of the Appropriations Act, since IRS stood ready to appoint her to the position should she prevail in the litigation.

Petitioner executed the following affidavit bearing her oath of allegiance to the United States:

> I, Veronica Yuen, do solemnly swear (or affirm) that I will support [and] defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same. So help me God.

On June 4, 1980, she filed an action in federal district court, pursuant to 28 U.S.C. §§ 1331, 1361 and the Fifth Amendment of the United States Constitution, against the IRS and named officials because they denied her employment due to her alienage. She sought $10,000 in damages and an order to hire her.

The district court conceded that in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court clearly decided that aliens are eligible for federal employment under the same provision contained in similarly-worded predecessor appropriations acts. Nonetheless, the district court declined to follow Hampton

and instead relied upon obscure excerpts of pre-Hampton legislative history to conclude that aliens, such as petitioner, are barred from federal employment. With respect to the constitutional issue, the district court correctly applied an intermediate equal protection standard but found that the statutory classification drawn by Congress furthered sufficiently important governmental interests to satisfy Fifth Amendment due process requirements. Summary judgment was granted in favor of defendants, and the complaint was dismissed. On appeal, the Second Circuit Court of Appeals affirmed for the reasons set forth in the district court's opinion.

## REASONS FOR GRANTING THE WRIT

The Second Circuit's decision--the only reported opinion interpreting the Appropriations Act--involves the important question of the extent to which Congress may discriminate against legal permanent resident aliens in federal employment.

Viewed as a matter of statutory construction, the decision below conflicts with this Court's decision in Hampton v. Mow Sun Wong, supra, which ruled that aliens may take an oath of allegiance and be eligible for federal employment.

However, if the Appropriations Act is construed to exclude aliens from federal employment, this Court is squarely presented with the constitutional question left open in Hampton: whether a congressional ban on the employment of aliens by the federal government violates equal protection principles encompassed in the Fifth Amendment. See Hampton v. Mow Sun Wong, supra, 426 U.S.

at 114, 117 (Brennan and Marshall, JJ., concurring). If the constitutional issue is reached, this case provides the Court with an opportunity to clarify the standard by which congressional action limiting the rights of aliens should be reviewed under the Fifth Amendment.

## I. THE SECOND CIRCUIT'S RESTRICTIVE CONSTRUCTION OF "A PERSON WHO OWES ALLEGIANCE TO THE UNITED STATES" UNDER THE APPROPRIATIONS ACT, 31 U.S.C. § 699b, IS IN DIRECT CONFLICT WITH A PRIOR DECISION OF THIS COURT.

In Hampton v. Mow Sun Wong, supra, this Court conclusively construed the term "A person who owes allegiance to the United States" to include aliens who take an oath of allegiance. At issue in Hampton was a Civil Service Commission [hereinafter "CSC"] regulation which provided that a person could be appointed to a competitive civil service position "only if he is a citizen of or owes permanent allegiance to the United States,"

5 C.F.R. § 338.101(1976)--i.e., a citizen or a noncitizen national*/ of the United States.

Plaintiffs in Hampton argued that the regulation was inconsistent with section 502 of Pub. L. No. 91-144 (1970), a substantially similar predecessor of the Appropriations Act here, which provided that appropriated funds could only be paid to a citizen or "a person who owes allegiance to the United States." 333 F. Supp. 527, 530, 531 (N.D. Cal. 1971); 426 U.S. at 93, n.6 and accompanying text.

This Court invalidated the regulation under the Fifth Amendment's due process clause, holding that "[s]ince these residents were admitted as a result of decisions made by the Congress and the President . . . due process requires that the decision to impose

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*/ A "national" is defined as "a person owing permanent allegiance to a state." 8 U.S.C. § 1101 (1980).

that deprivation of an important liberty be made . . . at a comparable level of government . . . ." 426 U.S. at 116. Central to this holding was a careful review of the language, purpose and legislative history of appropriations acts since 1938 and, specifically, the "owes allegiance" provision at issue here. See id. at 107-12. This Court thus concluded: "Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance, the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule." Id. at 110. Since this Court decided the statutory question at issue in this case, principles of stare decisis should control.

Moreover, Congress has demonstrated its acquiescence in the clear holding of Hampton by failing to modify the terms of the Appropriations Act to exclude aliens who take an oath of allegiance.

After Hampton was decided, the President issued Executive Order 11935 of September 2, 1976, which states that no "person" shall be admitted to competitive examination or given any appointment in the competitive service "unless such person is a citizen or national of the United States," except that the Commission may "authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments. 41 Fed. Reg. 37301 (Sept. 3, 1976). At the time, the President stated: "In its decision, the Court stated that either Congress or the President might issue a broad prohibition against the employment of aliens in the civil service, but held that neither Congress nor the President had mandated the

general prohibition." Letter of the President to the Speaker of the House, accompanying Executive Order 11935 of September 2, 1976. 41 Fed. Reg. 37301, 37303 (September 3, 1976). Both the executive order and the letter refer specifically to the "competitive service."

However, neither the President nor Congress has changed the terms of the yearly appropriations act or otherwise affected the status of the excepted service, such as the position sought by petitioner. Thus, although the appropriations acts clearly apply to both competitive and excepted service, see pp. 2-3 supra, Congress has acquiesced in the construction of the appropriations act given by Hampton as to excepted service positions, and reenacted the act as construed by Hampton. Plainly, Congress or the President knew of Hampton and could have acted to modify the terms of the appropriations act if they desired to because the President did, in fact, act as to competitive positions.

Since "Congress is presumed to be aware of . . . [a] judicial interpretation of a statute and to adopt the interpretation when it re-enacts a statute without change," Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) and authorities cited therein, it is clear that Hampton remains controlling authority with respect to this case.

The Second Circuit's characterization of dispositive passages in Hampton as dicta was erroneous for a number of reasons. First, this Court necessarily relied upon the "owes allegiance" provision of that appropriations act in determining that the class of persons eligible for employment under the statute was broader than the class eligible under the CSC regulation. Hampton held that the statute is "plainly more flexible and expansive" than the CSC rule

precisely because "Congress has regularly provided for compensation of any federal employee owing allegiance to the United States" and "it is settled that aliens may take an appropriate oath of allegiance." Id. at 109-10.

Second, the statutory question was clearly decided since the Hampton plaintiffs in fact had standing only to challenge the impermissible narrowing of the "owes allegiance" provision. It appears that the Hampton plaintiffs were not eligible for employment under any other statutory classification,*/ and two of the plaintiffs filed affidavits swearing allegiance to the United States, thereby confirming their

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*/ The other classifications included 1) citizens; 2) certain persons declaring their intent to become citizens; 3) certain aliens from Cuba, Poland, South Vietnam, or the Baltic countries; 4) certain Southeast Asian refugees; 5) citizens of Israel, the Philippines or nationals of countries allied in the "current defense effort"; or emergency temporary service. See pp. 2-3 supra.

standing to challenge the "owes allegiance" provision.

The controlling effect of Hampton on the statutory question in this case is further supported by the fact that it was decided only after this Court's thorough review of the language, legislative history and Presidential interpretation of the "owes allegiance" provision. Id. at 108-11. Since this question was not decided in a summary fashion, compare with Edelman v. Jordan, 415 U.S. 651, 670-71 (1974), the doctrine of stare decisis bans relitigation of settled law that an alien who takes an oath of allegiance is considered "a person who owes allegiance to the United States" and thus is eligible for federal employment.

## II. THE APPROPRIATIONS ACT, 31 U.S.C. § 699b, VIOLATES THE FIFTH AMENDMENT BY INVIDIOUSLY DISCRIMINATING AGAINST SOME ALIENS OVER OTHERS ON THE BASIS OF NATIONAL ORIGIN.

This Court has stated that Congress has broad power to restrict the rights of aliens residing in this country. See, e.g., Hampton v. Mow Sun Wong, supra, 426 U.S. at 118; Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); Hines v. Davidowitz, 312 U.S. 52, 69-70 (1941). While judicial scrutiny of federal governmental action in this area is admittedly narrow, the full reach of the equal protection component of the Fifth Amendment's due process clause has

not been precisely defined, and the standard of review for federal classifications based on alienage remains obscure.

In Hampton v. Mow Sun Wong, supra, this Court noted that "overriding national interests may provide a justification for a citizenship requirement in federal service even though an identical requirement may not be enforced by a State." 426 U.S. at 101. The Court nonetheless recognized certain limits upon federal power and thus cautioned that "[w]e do not agree, however, with the petitioners' primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." Id. However, with respect to an express Congressionally-mandated rule, i.e., a statute, the Court stated that it "might presume that any interest which might rationally be served by the rule did in fact give rise to its

adoption." Id. at 103 (emphasis added). No indication was given as to the particular considerations that would govern such a presumption.

Mathews v. Diaz, supra, decided on the same day as Hampton, involved a federal regulation that discriminated within the class of aliens by restricting Medicare benefits to aliens who were admitted for permanent residence and who had continuously resided in the United States for five years. Applying an apparently more relaxed standard than in Hampton, this Court upheld these eligibility requirements affecting only certain aliens since neither requirement was "wholly irrational." 426 U.S. at 83.

The instant case raises a question regarding federal alienage classifications that differs substantially from other cases previously decided by this Court. Unlike Hampton v. Mow Sun Wong, supra, and its

progeny,*/ the issue here does not involve a provision that draws a clear unvarying line between citizens and all aliens. Nor does the Appropriations Act make distinctions within a class of aliens on the basis of a neutral dividing line, such as the residency requirement in Mathews v. Diaz, supra. In addition, the Appropriations Act does not constitute a direct exercise of Congress's plenary power to admit and exclude aliens or to implement foreign policy decisions. See, e.g., Yassini v. Crosland, 618 F.2d 1356, 1360 (9th Cir. 1980) (upholding revocation of deferred departure dates for Iranian nationals under deportation orders); Narenji

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*/ See, e.g., Hampton v. Mow Sun Wong, 435 F. Supp. 37 (N.D. Cal. 1977), aff'd, 626 F.2d 739 (9th Cir. 1980), cert. denied, 101 S. Ct. 1419 (1981) (on remand); Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979); Ramos v. Civil Service Commission, 430 F. Supp. 422 (D.P.R. 1977) (three judge court) (upholding constitutionality of Executive Order 11935).

v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (upholding reporting requirements applied only to Iranian nationals). See generally Rosberg, "The Protection of Aliens From Discriminatory Treatment by the National Government," 1977 Sup. Ct. Rev. 275.

Instead, the Appropriations Act creates distinctions that permit federal employment of specifically-exempted aliens, defined by their national origin,*/ but deprives all other aliens of an important interest in liberty.**/ Such distinctions based on national origin have long been acknowledged to be "odious to a free people whose institutions are founded upon the doctrines of

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*/ See pp. 2-3 supra for enumerated categories of exempted aliens.

**/ This Court acknowledged in Hampton that "ineligibility for employment in a major sector of the economy [the federal government] . . . is of sufficient significance to be characterized as a deprivation of an interest in liberty. 426 U.S. at 102. See also Truax v. Raich, 239 U.S. 33, 41 (1915).

equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Where, as here, Congress selectively deprives certain aliens of a significant liberty interest under the due process clause on the basis of national origin, a higher level of judicial scrutiny should be required or, at minimum, a more clearly articulated standard than the vague criteria set forth in Hampton and Mathews.

Whatever standard of review is applied,*/ the Second Circuit erroneously concluded that section 699b rationally furthers the federal interests asserted by the government below. In support of its position, respondents contended that the statutory provision gives the President a bargaining chip in negotiating defense alliances, encourages naturalization and provides Congress with an expendable

**/ While the district court in the instant case applied an intermediate equal protection standard, 497 F. Supp. 1023, 1037-39; accord, Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977)(on remand); Petition for Naturalization of Olegario v. United States, 629 F.2d 204 (2d Cir. 1980), the Second Circuit did not decide what standard of review is appropriate. No. 80-6206 (2d Cir. May 21, 1981), slip op. at 3142.

foreign policy token--justifications which, not surprisingly, coincide precisely with what this Court posited in Hampton as possible legitimate governmental interests. 426 U.S. at 104.

Even assuming that the federal interests asserted are bona fide, the actual categories of aliens exempted by the statute are either underinclusive or overinclusive as implementation of the interests asserted. First, there is no evidence on the face of the Appropriations Act or its legislative history which demonstrates that, for instance, offering federal employment to Cuban or Polish lawful permanent resident aliens but not to, say, Czech or Soviet permanent resident aliens would serve as a "bargaining chip" or "token." Nor is there any demonstration that federal employment would be a better "bargaining chip" or "token" than the refusal to hire certain aliens (thus avoiding possible "brain drain" in those countries). Moreover, it is difficult to perceive how naturalization is encouraged

by exempting some but not all aliens on a basis having nothing to do with what an individual himself or herself could affect. Finally, if a purpose of the Appropriations Act is to prohibit federal employment of persons who have not renounced their allegiance to a foreign country, the statute does not accomplish this goal; it allows Israeli and Filipino citizens and certain aliens to qualify for federal civil service positions.

As this Court stated in Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975), "[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purpose underlying a statutory scheme." The skeletal standard set forth in Hampton and Mathews fails to permit any meaningful analysis of actual governmental interests furthered by the statutory provision and thereby allows discriminatory federal legislation to stand on mere hypothetical justifications. Given

the invidious nature of national origin classifications, the federal government should carry a heavier burden to justify such distinctions within the class of aliens. By reviewing this case on certiorari, this Court can clarify the degree to which Congress may restrict fundamental rights of permanent resident aliens under the Fifth Amendment.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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Dated: New York, New York
August 17, 1981

# APPENDIX

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 858—September Term, 1980

(Argued February 18, 1981 Decided May 21, 1981)

Docket No. 80-6206

VERONICA YUEN,

*Plaintiff-Appellant,*

—v.—

INTERNAL REVENUE SERVICE, GEROME KURTZ, in his capacity as Commissioner of the Internal Revenue Service; JOHN IMBESI, JOSEPH TRAGNA, H. KRAMER and CAROLE BUTLER, in their official capacities as agents/employees of the Internal Revenue Service,

*Defendants-Appellees.*

Before:

VAN GRAAFEILAND and KEARSE, *Circuit Judges,* and STEWART,* *District Judge.*

* Honorable Charles E. Stewart, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, 497 F. Supp. 1023, dismissing a complaint challenging the denial of federal employment to a resident alien under 31 U.S.C. § 699b.

Affirmed.

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BILL LAN LEE, New York, New York (Margaret Fung, Stanley Mark, Stephen Gleit, O. Peter Sherwood, New York, New York, of counsel), *for Plaintiff-Appellant*.

STEVEN E. OBUS, Assistant United States Attorney, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Peter C. Salerno, Assistant United States Attorney, New York, New York, of counsel), *for Defendants-Appellees*.

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KEARSE, *Circuit Judge*:

Plaintiff-appellant Veronica Yuen appeals from a final judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, dismissing her complaint against the United States Internal Revenue Service ("IRS") and certain of its employees for denial of employment with IRS. IRS refused to employ Yuen on the ground that a statutory provision entitled "Citizenship requirement for federal employees compensated from appropriated funds," codified at 31 U.S.C. § 699b (Supp. III 1979) (hereinafter, together with

its predecessor statutes, referred to as the "Appropriations Act" or the "Act"), prohibits employment by the federal government of persons other than United States citizens and certain groups of noncitizens that IRS contends do not include Yuen. Yuen contended that the proper construction of the Act does not, and could not constitutionally, exclude her from employment. The district court upheld IRS's interpretation of the Act and ruled that the Act, as construed, does not deprive Yuen of the equal protection of the law. We agree.

## BACKGROUND

The case involves the interpretation and constitutionality of 31 U.S.C. § 699b which, in effect, prohibits the federal government from employing in the continental United States any person

> unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on September 29, 1979, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, (4) is an alien from Cuba, Poland, South Vietnam, or the Baltic countries lawfully admitted to the United States for permanent residence, or (5) South Vietnamese, Cambodian and Laotian refugees paroled into the United States between January 1, 1975, and September 29, 1979 . . . .[1]

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[1] 31 U.S.C. § 699b provides:

> Unless otherwise specified during the current fiscal year no part of any appropriation contained in this or any other Act shall be

The relevant facts were stipulated and are set forth in greater detail in the district court's opinion, reported at 497 F. Supp. 1023, familiarity with which is assumed. Briefly, Yuen is a Chinese citizen, permanently residing in the United States, who in April 1980 applied for employment with the IRS. IRS offered Yuen a position, and she accepted the offer on the same day, after terminating other employment. Later that day, IRS realized that Yuen was a citizen of China rather than the United States (a fact disclosed on her written application). Believing that § 699b barred its employment of Yuen, IRS promptly informed her that citizenship was required for the position she had sought (a fact not disclosed in IRS's solicitation of applications), and that she was therefore not to report for work with IRS.

Yuen commenced the present action, alleging breach of contract and violation of her rights to equal protection

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used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person [is in one of the five categories quoted in the text accompanying this footnote]: *Provided*, That for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with: *Provided further*, That any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penal-clause shall be in addition to, and not in substitution for any other provisions of existing law: *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of Israel, the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

and due process. The complaint sought $10,000 in damages and an injunction compelling IRS to hire Yuen.

After commencing the action, Yuen executed an affidavit which stated as follows:

> I, VERONICA YUEN, do solemnly swear (or affirm) that I will support [and] defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same. So help me God.

Yuen contends, and IRS disputes, that on the basis of this affidavit she "is a person who owes allegiance to the United States" within the meaning of category (3) of § 699b.[2] In support of her position, Yuen pointed to the opinion of the Supreme Court in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), in which, while ruling on the constitutionality of certain regulations of the United States Civil Service Commission ("CSC" or "Commission"), the Court stated as follows:

> Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance, the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule.

*Id.* at 109 (footnote omitted). Yuen argued that she was entitled to judgment on the basis of this language, plus the provision in § 699b that "for the purpose of this

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2 Finding that IRS would have refused to hire Yuen even if she had executed such an affidavit prior to the decision on her application, the district court properly declined to base its decision on the technical ground that Yuen apparently did not "owe [ ] allegiance" to the United States at the time she was rejected.

section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with . . . ." Alternatively, she argued that if the statute were construed to bar her employment, it impermissibly distinguished among aliens on the basis of their nationalities, in violation of the Equal Protection Clause of the Constitution.

In an able opinion, Judge Sand granted summary judgment dismissing the complaint. He held, first, that the dicta in *Hampton* did not foreclose inquiry into the meaning of § 699b(3), 497 F. Supp. at 1028; second, that the language and legislative history of that section, reinforced by the history of similar language in other statutory provisions, led to the conclusion that the phrase "a person who owes allegiance to the United States" was intended to mean a noncitizen national of the United States rather than a nonnational alien who merely executes an affidavit, *id.* at 1035-36; and finally, that Congress's restriction on federal employment of aliens had a sufficient relationship to appropriate congressional concerns that it did not violate the Constitution, *id.* at 1040.

## DISCUSSION

We affirm principally on the basis of the district court's thorough opinion, which we adopt, and content ourselves here with a few observations.

### A. *Hampton v. Mow Sun Wong*

We agree with the district court that *Hampton v. Mow Sun Wong, supra,* did not definitively resolve the question presented here, and that the Supreme Court's observations with respect to the Appropriations Acts neither were

nor were intended to be dispositive of the meaning of "owes allegiance."

In *Hampton*, several resident aliens challenged the constitutionality of a CSC regulation that permitted a civil service appointment only if the candidate was "a citizen of or owe[d] permanant allegiance to the United States." 5 C.F.R. § 338.101 (1976). After first concluding that the question before it was the validity of a CSC regulation rather than the validity of a statute,[3] 426 U.S. at 98-105, the Supreme Court sought to determine whether there had been Congressional approval or disapproval of CSC's citizenship/nationalism requirement. In so doing it reviewed the then-current and four prior Appropriations Acts, whose "owes allegiance" provisions are identical to category (3) of the current § 699b. The Court found that the limitations on federal employment provided by Congress in the Acts gave rise to conflicting inferences as to whether or not the CSC rule was authorized:

> In the District Court respondents argued that the exemptions from the limitations included in the Appropriations Acts had become so broad by 1969 as to constitute a congressional determination of policy repudiating the narrow citizenship requirement in the Commission rule. Though not controlling, there is force to this argument. On the other hand, the fact

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3 The Court had granted certiorari on the question:

> Whether a regulation of the [CSC] that bars resident aliens from employment in the federal competitive civil service is constitutional.

426 U.S. at 98-99. The defendants had devoted their argument instead to the proposition that the CSC regulation was "within the constitutional powers of Congress and the President and hence not a constitutionally forbidden discrimination against aliens." *Id.* at 99.

> that Congress repeatedly identified citizenship as one appropriate classification of persons eligible for compensation for federal service implies a continuing interest in giving preference, for reasons unrelated to the efficiency of the federal service, to citizens over aliens. In our judgment, however, that fact is less significant than the fact that Congress has consistently authorized payment to a much broader class of potential employees than the narrow category of citizens and natives of American Samoa eligible under the Commission rule. Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance, [citing *In re Griffiths,* 413 U.S. 717, 726 n.18 (1973)], the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule. Nevertheless, for present purposes we need merely conclude that the Appropriations Acts cannot fairly be construed to evidence either congressional approval or disapproval of the specific Commission rule challenged in this case.

*Id.* at 109-110.

We agree with the district court's conclusion that the Supreme Court's discussion of the "owes allegiance" provision in the passage quoted above is not an authoritative construction necessary to the Court's determination of the validity of the CSC regulation. First, the Court did not purport to give a definitive interpretation of "owes allegiance"; rather, it stated that the statutory category of those owing allegiance was "not precisely defined." *Id.* at 109 (majority opinion); *id.* at 126 (Rehnquist, J., dissenting). Moreover, although Yuen argues that the discussion

of "owes allegiance" was essential to the decision because the *Hampton* plaintiffs were not eligible for federal employment under any other category of the Appropriations Act, we note that the meaning of "owes allegiance" was not considered an issue by the parties. The plaintiffs in *Hampton* made no assertion that they qualified under the "owes allegiance" provision, 426 U.S. at 126 (Rehnquist, J., dissenting); and the Commission, for its part, did not assert that employment of the plaintiffs was barred by the Appropriations Act. The Appropriations Acts were not listed by the parties as relevant statutory provisions; and none of the briefs, including the three *amicus* briefs filed, argued the meaning of the phrase "owes allegiance." Finally, it is clear that the decision of the case did not turn on a construction of "owes allegiance" favorable to the plaintiffs, since only two of the plaintiffs executed affidavits stating that they owed allegiance, and the Court's judgment did not distinguish between the two who had done so, and those who had not. The CSC regulation was held invalid as to all of them, and the basis of the invalidity was not the Appropriations Acts: the Court had concluded that those Acts could not fairly be construed as either approval or disapproval of the CSC rule in issue.

Consequently, we concur that the Supreme Court's discussion of "owes allegiance" in *Hampton* was dictum, and that the district court was bound to make its own inquiry into the meaning of the language.

B. *Congress's Intent*

We agree generally with the district court's analysis of the language and history of § 699b(3), and make the following observations.

Yuen relies in part on *Hampton* for the proposition that an affidavit such as she has executed here meets the

statutory requirement for proof that she "owes allegiance" to the United States. In *Hampton*, the Court stated that "it is settled that aliens may take an appropriate oath of allegiance," 426 U.S. at 109, citing *In re Griffiths*, 413 U.S. 717, 726 n.18 (1973), in which the Court had rejected the proposition that only a citizen could in good faith take an oath to support the Constitution, and had held that a state may not restrict an individual from practicing law on the basis of alienage. The proposition that an alien may in good faith take an appropriate oath of allegiance to the United States, however, does not compel the conclusion that Congress intended a conclusory oath to suffice to establish an alien as a person who "owes allegiance" to the United States, for purposes of federal employment. Thus, the language of *Hampton* and the ruling in *Griffiths* do not dispose of the question at issue here, which is not who may take an oath, but rather what Congress meant by "owes allegiance."

The intendment of category (3) must be assessed in light of Congress's overall purpose in enacting § 699b. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Contrary to Yuen's suggestion that the "overall statutory purpose" of the Appropriations Act was to authorize federal employment of a much broader class of potential employees than citizens and other nationals, we agree with the district court's view that the *overall* purpose of the Act was restrictive.[4] As originally proposed, the Act would have limited federal employment strictly to citi-

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[4] The district court did not err by testing this conclusion against analogous or related statutes since other statutes "not strictly *in pari materia* but employing similar language and applying to similar persons, things, or cognate relationships may control by force of analogy." *Stribling v. United States*, 419 F.2d 1350, 1352 (8th Cir. 1969).

zens. 83 Cong. Rec. 357, 713 (1938). Although that proposed exclusivity was relaxed, the tenor of the statute remains restrictive. The Act is phrased in negative terms: it provides that no federally appropriated moneys may be used to employ anyone who is not within the groups listed. The congressional debate with respect to the "owes allegiance" category evinced concern for only limited groups of aliens—most notably the Filipinos—who by virtue of their status, owed allegiance to the United States. And the subsequently added special categories of § 699b, apparently enacted in response to international political situations, have extended federal employability to aliens from only specified countries, such as Poland, Pub. L. No. 87-125, 75 Stat. 268, 282 (1961); Cuba, Pub. L. No. 93-143, 87 Stat. 510, 525 (1973); South Vietnam, Pub. L. No. 94-91, 89 Stat. 441, 458 (1975); and Cambodia and Laos, Pub. L. No. 95-429, 92 Stat. 1001, 1015 (1978). Congressional debate surrounding certain of these special extensions reveals a belief that such extensions are the only means by which such an alien may obtain federal employment. Thus, in arguing in favor of the most recent exception for Cambodian and Laotian refugees, Congressman Steed stated that "[w]ithout this waiver, even though they do come in legally as refugees, they would not be allowed to work for the Federal Government." 124 Cong. Rec. H. 11439 (1978).

In short, we do not find support for the proposition that Congress intended to allow the mere execution of an affidavit promising allegiance to convert any and every alien into a person who "owes allegiance" to the United States within the meaning of § 699b.[5]

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5 *Cf. Woodward v. Rogers*, 344 F. Supp. 974, 984 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973) (table), construing the phrase "owing allegiance" in the passport law, 22 U.S.C. § 212:

*(footnote continued)*

C. *The Constitutional Question*

The district court ruled that § 699b, as interpreted to deny federal employment to aliens whose sole claim of employability under § 699b was the execution of an affidavit swearing allegiance, did not deny Yuen equal protection of the law because it sought to further appropriate congressional goals. Yuen argues that although the court correctly chose an "intermediate" standard of review of the propriety of Congress's classifications, it erred in its conclusions that the statute evinced proper congressional concerns. IRS, on the other hand, while approving the district court's conclusion, argues that only minimal judicial scrutiny of Congress's actions was appropriate and that § 699b must be upheld if it has any rational basis.

While there is contemporaneous support for both positions as to the standard of review, *compare Hampton v. Mow Sun Wong, supra* (because CSC regulation deprived aliens of a liberty interest, "some judicial scrutiny of the deprivation is mandated by the Constitution"), 426 U.S. at 103, *with Mathews v. Diaz*, 426 U.S. 67, 82, 83 (1976) (under "narrow standard of review," Medicare benefit restrictions based on alienage were upheld where not "wholly irrational"), we see no need to decide which standard of review was required here. Even under the intermediate review used by the district court, we find no error in the conclusion that the statute furthers important governmental interests.

The judgment of the district court dismissing the complaint is affirmed. No costs.

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The statutory test is whether one "owes" allegiance—that is, whether he is regarded by law as "owing" allegiance to the United States by virtue of his territorial residence and status. The statutory test is not whether one "gives" or promises his allegiance to the United States.

## OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| VERONICA YUEN, | : | |
| Plaintiff, | : | 80 Civ. 3177 |
| vs. | : | |
| INTERNAL REVENUE SERVICE et al., | : | OPINION |
| Defendants. | : | |

Stephen Gleit, New York City, for plaintiff.

John S. Martin, Jr., U.S. Atty., for the Southern District of New York, Steven E. Obus, Asst. U.S. Atty., New York City, for defendants.

SAND, District Judge.

Plaintiff is a permanent resident alien who claims that she sought and was unlawfully denied federal employment solely on account of her alienage.[1] Plaintiff first contends

1. Plaintiff is apparently a citizen of China who came to this country as a student in 1970. (Yuen Aff. p. 8). Her assertion that she is a lawful permanent resident alien is not contested by the defendants. (Yuen Aff. p. 6). The position for which plaintiff applied is an excepted, i.e., non-Civil Service position. See discussion, infra. Positions

(footnote continued on next page)

that she "owes allegiance" to the United States[2] and is therefore eligible for federal employment under 31 U.S.C. § 699b (Supp. 1980), (referred to hereinafter as the "appropriation act" or "§ 699b"), which, with certain exceptions, effectively limits federal employment opportunities to citizens, aliens from specifically enumerated countries, and those who "owe

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(footnote continued)
in the competitive Civil Service are generally limited to citizens or "nationals" of the United States. Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1974). See also, Jailil v. Campbell, 590 F.2d 1120 (D.C. Cir. 1978); Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), cert. denied 441 U.S. 905, 99 S. Ct. 1993, 60 L.Ed.2d 373 (1979); Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Calif. 1977); Ramos v. Civil Service Commission, 430 F. Supp. 422 (D.P.R. 1977) (3 Judge Court).

2. Plaintiff's claim that she "owes allegiance" to the United States is based solely on her execution, on June 10, 1980, of the following affidavit:

> I, VERONICA YUEN, do solemnly swear (or affirm) that I will support defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same. So help me God.

allegiance" to the United States.[3] Alterna-

3. The statute, which limits the class of persons who can be compensated from funds appropriated by Congress and which is entitled "Citizenship requirement for federal employees compensated from appropriated funds" provides that:

"Unless otherwise specified during the current fiscal year no part of any appropriation shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on September 29, 1979, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, (4) is an alien from Cuba, Poland, South Vietnam, or the Baltic countries lawfully admitted to the United States for permanent residence, or (5) South Vietnamese, Cambodian and Laotian refugees paroled into the United States between January 1, 1975, and September 29, 1979; Provided, That for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with; Provided further, That any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both; Provided further, That the above penal-clause shall be in addition to, and not in substitution for any other provisions of

(footnote continued on next page)

tively, if her status is construed as not falling within the express terms of that statute, plaintiff argues that the "distinction made by the statute between alien[s] eligible to work and receive compensation and those alien[s] not eligible to work and receive compensation is unconstitutional and deprives

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(footnote continued)
existing law; Provided further, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of Israel, the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies." 31 U.S.C. § 699b.

Section 699b is from the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, 574 (1979). Similar appropriations acts have been enacted annually since at least 1938. See, e.g., Treasury and Post Office Department Appropriations Act for 1939, Pub. L. No. 75-453, 52 Stat. 120, 148 (1938).

plaintiff of equal protection of the law." (Plaintiff's Memorandum of Law In Support of Issuance of Preliminary Injunction at 2).

At a hearing held on June 10, 1980, plaintiff's application for preliminary injunctive relief was denied.[4] Since there are no disputed issues of material fact, the parties have agreed to present the case to the Court for disposition on the merits on stipulated facts.[5] After considering a series of

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4. Plaintiff commenced this action by complaint dated June 4, 1980, alleging that the Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361 and the Fifth Amendment to the United States Constitution. Simultaneously with the filing of the complaint plaintiff sought a preliminary injunction to prohibit defendants from hiring any person other than herself for the position in question.

Although the hearing on June 10, 1980 was not transcribed, the Court summarized its reasons for denying plaintiff's application at a subsequent hearing on June 16, 1980. See Transcript of June 16, 1980 Hearing (hereinafter "Trans.") at 4-6.

5. The parties also agreed that plaintiff's affidavit in support of her application for a preliminary injunction ("Yuen Aff."), together with the opposing affidavit of Robert Walker, Chief, Personnel Branch, North Atlantic Region, Internal Revenue Service ("Walker Aff."), would constitute the agreed statement of facts.

briefs submitted by each side,[6] the Court finds that plaintiff is not eligible for federal employment under the appropriation act and that the statute does not deprive her of equal protection of the law. Accordingly, summary judgment is granted in favor of the defendants and the complaint is dismissed.

I. The Factual Background

On April 6, 1980, plaintiff, a second year law student, applied for a position as a Legal Research Assistant with the New York City Appeals Office of the Internal Revenue Service ("IRS"). (Yuen Aff. p. 2). Plaintiff disclosed her alien status both in her employment application (Standard Form 171) and at

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6. In addition to the briefs submitted in connection with plaintiff's application for a preliminary injunction, supplemental memoranda of law were served and filed prior to the hearing on June 16, 1980. At that time, the Court requested further briefing on specific questions, see Trans. at 8-13, and final briefs were submitted on July 8, 1980.

her employment interview. (Yuen Aff. pp. 6, 8). Apparently, the job description for the position she sought "did not require United States citizenship as a condition of employment." (Yuen Aff. p. 7).[7]

On May 29, 1980, John Imbesi, Associate Chief, New York City Appeals Office, telephoned Ms. Yuen and offered her a position as a Legal Research Assistant commencing on June 2, 1980. (Walker Aff. p. 4). Plaintiff was to work "full time" during the summer and "part-time during the academic year." (Yuen Aff. p. 10). After obtaining a release from a prior employment commitment of which defendants were apparently aware (Yuen Aff. pp. 3, 4), Ms. Yuen telephoned Imbesi later in the day on

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7. According to the IRS, Internal Revenue Manual 13 G 107 (April 7, 1978) contains guidelines to be followed in hiring law students as part time Legal Research Assistants. (Walker Aff. p. 2).

May 29, 1980 and accepted the position. (Walker Aff. p. 5; Yuen Aff. p. 2). That same day, after "discovering" that Yuen was not a United States citizen, Imbesi contacted IRS Personnel Specialist Carole Butler, who immediately rescinded the offer.[8] (Walker Aff. pp. 6, 7). Although the interval of time between the offer of employment and its withdrawal was thus no more than several hours, it was long enough for plaintiff to have obtained a release from her prior employment commitment. Plaintiff maintains that she still desires a Legal Research Assistant's position with the IRS. (Yuen Aff. p. 9).

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8. Butler attempted to reach Yuen by telephone late in the afternoon of May 29, 1980. Although she did not reach Yuen directly, Butler left a message to the effect that "United States citizenship was required and that she [Yuen] should not report for work on June 2, 1980." (Walker Aff. p. 7).

We note that the IRS asserts that "[t]he action of the North-Atlantic Region, Internal Revenue Service in rescinding the oral offer of appointment made to Yuen was based upon the legal proscription against utilizing appropriated funds to pay non-citizens." (Walker Aff. p. 8) (emphasis added.) It is clear from defendant's subsequent assertions, however, both

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## II. The Statutory Issue

### A. Preliminary Considerations

Plaintiff contends that an oath of allegiance which she executed in affidavit form on June 10, 1980 makes her eligible for federal employment under the "owes allegiance" provision of § 699b(5).[9] Plaintiff also points specifically to the clause in that statute which provides that "for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with . . .." Id. On the other hand, the government contends that Congress' intent when it first enacted the "owes allegiance" provision in 1938 was to exempt non-citizen "nationals", i.e., inhabitants of United

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(footnote continued)
at oral argument and in various briefs, that IRS's actual position is that the offer was rescinded because plaintiff is not encompassed within any of the categories of eligible employees contained in the appropriation act. See note 3, supra.

9. See notes 2 and 3, supra.

States possessions such as Puerto Rico or the Philippines, from a newly imposed citizenship requirement,[10] rather than to open federal employment to any alien willing to take an oath. The government claims that at the present time, the only non-citizens who owe allegiance to the United States in the sense that that phrase is used in the statute are inhabitants of American Samoa. Before reaching these primary statutory contentions, there are two preliminary matters which must first be addressed: the first relates to the timing of plaintiff's oath of allegiance; the second concerns plaintiff's contention that the statutory issue in this case has already been resolved by the United States Supreme Court's decision in Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L.Ed.2d 495 (1976) (Hampton I.)

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10. See discussion infra. A citizenship requirement had long been imposed by the Civil Service Commission. See Hampton v. Mow Sun Wong, 426 U.S. 88, 105, 110-111, 96 S. Ct. 1895, 1906, 1908-1909, 48 L.Ed.2d 495 (1976).

Plaintiff applied for federal employment on April 6, 1980 and was offered, accepted and ultimately denied a Legal Research Assistant's position on May 29, 1980. Since her oath of allegiance, on which she relies exclusively to establish her statutory claim,[11] was executed on June 10, 1980, Ms. Yuen apparently did not "owe allegiance" to the United States in the sense that she uses the phrase either at the time of her application or at the time the offer was made, accepted, and withdrawn. It is thus arguable, although the government has not raised this issue, that plaintiff's statutory claim is non-justiciable because she could not prevail even if her in-

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11. Plaintiff puts forth no other ground on which to base her claim of allegiance. Moreover, it is clear that neither the duration nor the nature of her residence in the United States will satisfy the "owes allegiance" requirement. See Oliver v. United States Department of Justice, Immigration and Naturalization Service, 517 F.2d 426 (2d Cir. 1975), cert. denied, 423 U.S. 1056, 96 S.Ct. 789, 46 L.Ed.2d 646 (1976).

terpretation of the statute is correct.

While the Court has raised this question on its own initiative, we decline to reach such a result. Despite IRS's assertion that it "stands ready" to hire plaintiff if she should prevail in this litigation (Walker Aff. p. 9; Trans. at 15), the Service has persisted in its refusal to hire Ms. Yuen even after her execution of an oath of allegiance. Obviously, the government disputes plaintiff's interpretation of the statutory phrase "owes allegiance"; just as obviously, Ms. Yuen, as a result of that dispute, is being denied a position which would otherwise be hers. We turn next to plaintiff's argument concerning the significance of Hampton I to the statutory issue in this case.

In Hampton I, the Supreme Court held that a Civil Service Commission ("CSC") regulation which excluded all aliens from competitive Civil Service employment[12] and which was not

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12. The CSC regulation at issue in Hampton I, 5 C.F.R. § 338.101 (1976), provided in pertinent part: (footnote continued on next page)

mandated by either Congress or the President deprived aliens of liberty without due process of law.[13] Addressing the question whether the

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(footnote continued)

"(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

"(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute."

Under the CSC's interpretation of the regulation, except for the specific exceptions under § 338.101(b)(1) and (2), only citizens and residents of American Samoa were qualified. See Hampton I, at 90 n.1, 96 S. Ct. at 1899.

13. The Court first assumed "without deciding that the national interests identified by the . . . [government] would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service." 426 U.S. at 116, 96 S. Ct. at 1911. It then concluded, however, that because the "only concern of the [CSC] is the promotion of an efficient federal service . . .," the Commission, unlike Congress or the President, see discussion infra, could put forth no interest other than efficiency in support of a citizenship requirement. Id. at 114-115, 96 S. Ct. at 1910. Since the Court found no

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CSC regulation at issue was mandated by Congress, the Court examined, inter alia, the citizenship requirements contained in Appropriation Acts similar to the one currently before us.[14] Id. 426 U.S. at 108-109, 96 S. Ct. at 1907-1908. The Court found that

> " . . . Congress has consistently authorized payment to a much broader class of potential employees than the narrow category of citizens and natives of American Samoa eligible under the Commission rule. Congress has regularly provided for compensation of any federal employee owing

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(footnote continued)
evidence that the regulation at issue resulted from a "considered evaluation of the relative desirability [from the standpoint of efficiency] of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other," it held that the CSC's efficiency interest could not support the rule. Id. Finally, the Court noted that

> "[a]ny fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience in this case." Id. at 115-116, 96 S. Ct. at 1911. (Footnote omitted).

14. See note 3, supra.

> allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance, the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule." Id. at 109, 96 S. Ct. at 1908. (Footnote omitted).

Plaintiff relies on this passage from Hampton I to argue that "the Supreme Court necessarily decided that the phrase 'a person who owes allegiance to the United States' in the appropriations act may include an alien" and that the principles of stare decisis bar a reconsideration of that issue by this Court. (Plaintiff's Response To Defendant's Memorandum of Law at 6; Plaintiff's Further Memorandum of Law at 5-7). The government characterizes this portion of Hampton I as "dictum" and contends that in Hampton I the Court "was not squarely presented with any issue requiring interpretation of the 'owes allegiance' provision of any federal appropriations act." (Memorandum of Law In Opposition to Plaintiff's Motion For A Preliminary

Injunction at 15; Defendants' Supplemental Memorandum at 16-17).

Plaintiff's contention is not without initial appeal. Although the Court's suggestion that aliens are eligible for employment under the appropriations acts because they can take an oath of allegiance is technically dictum, Hampton I referred specifically to the "owes allegiance" provision and its impact on aliens to support its conclusion that the class eligible under those acts is more expansive than the class eligible under the CSC rule. This conclusion, moreover, was central to the Court's finding that the rule was not mandated by Congress, which was in turn central to the Court's holding that the rule violated due process. Nevertheless, we reject the contention that Hampton I "necessarily decided" the meaning of "owes allegiance" in this context, and conclude that Hampton I does not foreclose an analysis of that question by this Court.

As the government correctly points out, the Hampton I Court was not "squarely presented" with any issue requiring interpretation of the "owes allegiance" provision. The passage relied on by plaintiff was undoubtedly an important "building block" in the Court's reasoning, but the essential part of that passage is the finding that:

> " . . . Congress has consistently authorized payment to a much broader class of potential employees than the narrow category of citizens and natives of American Samoa eligible under the Commission rule."
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> 426 U.S. at 109, 96 S. Ct. at 1908.

The Court's passing reference to the apparent plain meaning of the "owes allegiance" provision,[15] however, was not essential to the conclusion that the CSC rule was not mandated

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15. Although the Court made some references to the legislative history of the appropriation acts, see 426 U.S. at 108, 96 S. Ct. at 1907, no detailed analysis of the purposes and origins of either the "owes allegiance" provision or the affidavit provision, see text accompanying notes 9-10 supra, appears to have been undertaken by the Court or the parties. See the following briefs in Hampton I: Brief For the Petitioners at 83-84; Brief For the Respondents; Reply Brief For the Petitioners.

by Congress. Even if an oath alone cannot qualify aliens for federal employment under the appropriation acts, "the statutory category . . . is [still] plainly more flexible and expansive than the Commission rule."[16] Finally, to conclude that Congress meant something other than an oath of allegiance when it used the phrase "owes allegiance" is not to deny that "aliens may take an appropriate oath of allegiance . . . ." Id., citing In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

We thus proceed with our analysis of the language and legislative history of the relevant appropriation acts.

B. The Statutory Language

On its face, § 699b appears to support plaintiff's position. Plaintiff has signed an affidavit stating that she "will bear true faith and allegiance to" the Constitu-

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16. Compare 31 U.S.C. § 699b (note 3 supra) with 5 C.F.R. § 338.101 (note 12 supra).

tion of the United States.[17] Since the statute provides that "an affidavit signed by [a person seeking federal employment] . . . shall be considered prima facie evidence that the requirements of this section with respect to [her] status have been complied with; . . .," the burden would appear to be on the government to prove that plaintiff's affidavit is false. Obviously, this argument assumes that an oath can satisfy the "owes allegiance" requirement. Although we ultimately conclude that the legislative history compels a contrary conclusion, there are difficulties with such an assumption that are apparent from the face of the statute.

"Allegiance" generally denotes loyalty to a nation, sovereign or cause.[18] It is

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17. See footnote 2 supra.

18. Webster's New Twentieth Century Dictionary (2d Ed. 1970) defines allegiance as follows:

1. the relationship of a vassal to his feudal lord.

2. the tie or obligation of a citizen or subject to his government or ruler; the duty of fidelity to one's ruler, government,

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impossible, however, to assign meaning to a particular use of the term without understanding how such loyalty must be proven in the circumstances to which that usage applies. See Oliver v. United States Department of Justice, 517 F.2d 426, 427 (2d Cir. 1975) ("the concept of owing allegiance for purposes of nationality is not so easily . . . understood"), citing Koessler, "'Subject,' 'Citizen', 'National' and 'Permanent Allegiance,'" 56 Yale L.J. 58, 67-69 (1946).[19] Unfortunately,

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(footnote continued)
or country. Natural or implied allegiance arises from the connection of a person with the society in which he is born, and from his duty to be a faithful citizen, independent of any express promise.
3. loyalty and devotion in general, as to a church, a political party, a principle, a leader.

19. In its original feudal setting, "allegiance" denoted a reciprocal correlation of interconnected rights and duties between those in authority and those who relied on that authority for their protection. See Koessler, supra, who argues that to the extent that the obligations of a citizen or national of a modern state are seen as unconditional rather than contingent upon a state's compliance with corresponding duties, the term "allegiance" has become archaic.

the language of § 699b provides no guidance as to how Congress intended to define "allegiance" or as to how a person seeking federal employment could prove that he or she owed allegiance to the United States. Plaintiff, of course, contends that an oath is sufficient.

The government urges that an acceptance of plaintiff's contention would render meaningless the appropriation act's specific exceptions for aliens from the enumerated countries.

> "[H]aving categorized in great detail the circumstances under which persons of various nationalities would be exempt from the statute, it defies logic to suggest that Congress intended these distinctions to be obliterated by the expedient of an individual's taking an oath of allegiance which might, in any event, be required of employees qualifying under other subsections of the statute."[20] (Memorandum of Law In Opposition To Plaintiff's Motion For A Preliminary Injunction at 17).

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20. The government has advised the Court that federal employees are required to take an oath of allegiance only when required by specific statute or regulation.

Plaintiff argues that acceptance of her interpretation of the statute would not undermine these statutory exemptions, because aliens from the enumerated countries will be immune from the allegiance requirement while other aliens will be required to take an oath. "Congress may also have specially exempted certain classes of aliens . . . for the specific purpose of permitting them to work for the government without having formally to declare their allegiance to the United States, which is otherwise required by status or declaration." (Plaintiff's Further Memorandum of Law at 18).[21]

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21. Plaintiff goes on to argue that: "In the specific case of Filipinos, for example, under the Tydings-McDuffie Act of March 24, 1934, [Pub. L. No. 73-127, 48 Stat. 456 (1934)] the allegiance of Filipinos was to be transferred to the new republic upon the day of independence from the United States. It would have been unduly harsh and contradictory to force a class of people, by statute, to change their allegiance and at the same time, take away their jobs or opportunities for employment, solely because of the transfer of allegiance. In the more general case of refugees, typically aliens fleeing a communist

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While plaintiff's argument is not without merit, we are not convinced that Congress, by exempting specified aliens from a general citizenship requirement for federal employment, intended only to relieve such aliens from the burden of satisfying the "owes allegiance" provision by taking an oath. The statute as a whole suggests that Congress intended to restrict federal employment to persons with a clearly demonstrable affinity to the United States, i.e., citizenship, "allegiance" or, under some circumstances, an

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(footnote continued)
government or a communist takeover (e.g., Cuba, Vietnam and Cambodia), the usual hope was that these people would return to their native countries at a future date. To declare their allegiance to the United States would jeopardize their relationship to their native countries. Congress, thus, may have set up two classes of aliens who are eligible for federal employment: one class which must formally declare allegiance to the United States and one class which need not." Plaintiff's Further Memorandum of Law at 18-19 (footnotes omitted).

intent to become a citizen, and to specified groups of aliens upon whom the benefit of eligibility for such employment is for one reason or another bestowed.[22] Plaintiff's interpretation of the "owes allegiance" provision would open federal employment to aliens not from the enumerated countries whose claim of allegiance is based on an arguably minimal demonstration of affinity to the United States. Moreover, under § 699b(2), persons currently in the "service"[23] of the United States who are eligible for citizenship must

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22. Aside from temporary employees, exempted aliens are all either from countries under communist control or from countries with a close defense relationship with the United States. See discussion, infra.

23. Although the question is not before us, the legislative history of the citizenship requirement and its exceptions clearly suggest that in the "service" of the United States refers to service in the armed forces. See 83 Cong. Rec. 2531-2532 (remarks of Senator Hayden).

file a "declaration of intention to become a citizen" before they are eligible for federal employment. If plaintiff's interpretation of the statute is correct, Congress has effectively made federal employment more easily obtainable by aliens not included under any statutory exemption other than § 699b(3) than it is by aliens covered under § 699b(2).

In sum, the Court concludes that despite the apparent plain meaning of the statute, it would be inappropriate if not impossible to attempt to divine what Congress meant by "owes allegiance" without examining the relevant legislative history.

C. The Legislative History

Congress first adopted the appropriation act's restriction on federal employment in two acts passed in 1938.[24] During the House

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24. Independent Offices Appropriation Act, 1939, Pub. L. No. 75-534, 52 Stat. 410, 435 (1938); Treasury and Post Office Department Appropriation Act for 1939, Pub. L. No. 75-453, 52 Stat. 120, 148 (1938).

debate on the two appropriation bills,[25] an amendment restricting federal employment to citizens of the United States was offered by Congressman Starnes.[26] The purpose of the amendment, according to Congressman Starnes, was to "protect the integrity of the National Budget and to give preferred employment to American citizens . . .."

> "At a time when millions of American citizens are unemployed and unemployment is increasing daily it is high time we weed out of our governmental agencies every employee who is not a citizen of the United States. When American taxpayers are taxed for the support of our regular governmental agencies and institutions certainly American citizens should be employed to administer these agencies and to receive the compensation raised by such taxes. Unquestionably hundreds of millions of dollars have been spent in the past 5 years in giving employment to people who were not American citizens even though we had millions of American citizens out of employment. This practice must stop. I urge the adoption of my amendment."

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25. See H.R. 8837 and H.R. 8947, 75th Cong., 3rd Sess. (1938).

26. The full text of the amendment to H.R. 8837, which was identical in substance to

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83 Cong. 357 (1938). See also 83 Cong. Rec. 713 (1938); Hampton I, 426 U.S. at 108, 96 S. Ct. at 1907.

Although both bills passed the House without further debate, the Senate subsequently added the "owes allegiance" provision.[27]

The Senate debate surrounding the adoption of this provision demonstrates that it was intended to protect Filipinos employed by the government. In 1938, the Philippine Islands were still a part of the United States, and Filipinos occupied the status of non-citizen "nationals". See Rabang v. Boyd, 353 U.S. 427, 429, 77 S. Ct. 985, 986, 1 L.Ed.2d

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the amendment to H.R. 8947, provided that: "No part of any appropriation contained in this act or authorized hereby to be expended shall be used to pay the compensation of any officer or employee of the Government of the United States or of any agency, the majority of the stock of which is owned by the Government of the United States, whose post of duty is in continental United States, unless such person is a citizen of the United States." 83 Cong. Rec. 357 (1938). See also, 83 Cong. Rec. 713 (1938).

27. Immediately following the amendment quoted in note 26 supra, the Senate added
(footnote continued on next page)

956 (1957).[28] Apparently, Filipinos had been permitted to take Civil Service examinations since 1903. 83 Cong. Rec. 2532 (1938) (remarks of Senator Hayden). By 1938, a substantial number of Filipinos had long been employed by the federal government, and the concern was that they would be "automatically thrown out" as a result of the newly adopted citizenship requirement. Id. at 2532. See also 83 Cong. Rec. 2424 (1938). Senator Glass, who introduced the amendment which contained the "owes allegiance" provision to the first of the two House appropriation bills, specifically stated that its purpose was to immunize such employees from the citizenship requirement.

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the clause: "or a person owing allegiance to the United States, or who is now in the service of the United States." 83 Cong. Rec. 2424, 2532 (1938).

28. The term "national" was apparently not statutorily defined until Congress passed the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940). See discussion, infra.

> Mr. GLASS. Mr. President, the purpose of the amendment is to protect several thousand people in the United States who are now employed by the Government and who have not had an opportunity to take out citizenship papers.
>
> Mr. NORRIS. In other words, it limits the section; it takes out of the class mentioned those who are included in the amendment?
>
> Mr. GLASS. It exempts that class.
>
> Mr. NORRIS. I have no objection.
>
> Mr. McKELLAR. Mr. President, as I understand, those to whom it would apply are mostly Filipinos who have been in this country for a number of years.
>
> Mr. GLASS. Yes.
>
> Id.[29]

The use in this context of the phrase "owes allegiance to the United States" is not surprising. Only four years earlier, Congress had enacted the Tydings-McDuffie Act of 1934, Pub. L. No. 73-127, 48 Stat. 456 (1934), which established a timetable for the transition of the Philippine Islands from a United States possession to an inde-

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29. While plaintiff attaches great significance to the words "mostly Filipinos," see Plaintiff's Further Memorandum of Law at 13, the Court sees this portion of the colloquy as nothing more than a recognition that inhabitants of American territorial possessions other than the Philippine Islands were in similar position. See discussion infra.

pendent nation.[30] Section 2(a)(1) of that Act provided that until such time as independence was proclaimed by the President, "[a]ll citizens of the Philippine Islands shall owe allegiance to the United States." (Emphasis added). The "owes allegiance" provision was thus a particularly appropriate means for describing the relationship between Filipinos and the United States, as Senator Hayden, who introduced the amendment to the second of the two House appropriation bills, was apparently aware:

> Mr. Hayden. . . .the words "or a person owing allegiance to the United States" describe the status of a Filipino. He is not a citizen of the United States, but he owes allegiance to the United States. 83 Cong. Rec. 2532 (1938).

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30. The act established a ten-year period of gradual reduction of American control. The probationary period was interrupted by Japanese occupation during World War II but was completed on July 4, 1946.

The fact that Congress on more than one occasion used the phrase "owes allegiance to the United States" to describe the "status of a Filipino" strongly suggests that Congress intended the phrase to describe the relationship between the United States and inhabitants of its territorial possessions, rather than as descriptive of the state of mind required of individual persons. Under this construction, "owes allegiance" would be synonymous with the concept of non-citizen "national", a phrase frequently used to describe the status of non-citizen inhabitants of this country's territorial possession. See Rabang v. Boyd, supra. In the case of a non-citizen, nationality depends primarily upon place of birth, and not upon one's willingness to express loyalty to the United States. See Oliver v. United States Department of Justice, 517 F.2d at 427; Cabebe v. Acheson, 183 F.2d 795, 797 (9th Cir. 1950). Plaintiff contends, however, that a "national" is one who owes permanent alle-

giance to the United States, and that if the "owes allegiance" provision was meant to apply only to non-citizen nationals, Congress would have used "permanent allegiance" rather than just "allegiance" when it enacted the exemption from the appropriation act's citizenship re-requirement. (Plaintiff's Further Memorandum of Law at 21). Plaintiff points specifically to the language of the Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940), to support the significance of this distinction. The Nationality Act defines a "national of the United States" as a citizen of the United States or "a person who, though not a citizen . . . owes permanent allegiance to the United States." Id. § 101(b); 8 U.S.C. § 1101(a)(22) (1976).

We are not convinced that Congress was so discriminating in its use of these two phrases. Although the Nationality Act, which was apparently the first attempt to statutorily define the term "national", and the "owes allegiance"

provision of the appropriations act were both intended to apply to Filipinos, Congress used "permanent allegiance" in one context and "allegiance" in the other. See Cabebe v. Acheson, supra; Scholz v. Shaughnessy, 180 F.2d 450 (2nd Cir. 1950). Congress also used "allegiance" in the Tydings-McDuffie Act. In addition, Congress' earlier use of the phrase "owes allegiance" in a 1902 revision to the passport law, Pub. L. No. 57-158, 32 Stat. 386 (1902), indicates that both "allegiance" and "permanent allegiance" have been used exclusively, in the case of non-citizens, to describe the status of inhabitants of United States territories.

Prior to 1902, the passport law authorized the issuance of passports only to citizens of the United States. 35 Cong. Rec. 4993 (1902). As a result of the 1902 amendment, the statute, which has remained in force without further amendment to the present day, provides that:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States. 22 U.S.C. § 212 (1979).

The legislative history of the amendment to the act demonstrates that its purpose was to enable the Secretary of State to issue passports to inhabitants of the territories acquired as a result of the recent war with Spain.[31] The statute was obviously not intended to authorize the issuance of passports to any alien willing to take an oath of allegiance to the United States.[32]

In a letter to the Chairman of the House Committee on Foreign Affairs, included in the

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31. According to the amendment's sponsor,
> The sole object of the measure is to enable the State Department to issue passports to all the citizens of the United States and those of our recent possessions. . . .
>
> The amendment simply revises the law in that respect and has no other object.

35 Cong. Rec. 5697 (1902) (remarks of Congressman Adams). See discussion, infra.

32. See discussion infra. Under current State Department regulations, a passport may be issued "only to a national of the United States." 22 C.F.R. § 51.2(a) (1979). A

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Committee's brief but unanimous report on the amendment, Secretary of State John Hay wrote:

> SIR: I have the honor to inclose herewith a draft of a proposed amendment to sections 4076, 4078 and 4075 of the Revised Statutes of the United States, which now limit the issuance of passports to citizens of the United States.
>
> Since the treaty of peace with Spain the Department has received applications for passports from residents of the Philippine Islands, Porto (sic) Rico, and Guam.
>
> The purpose of the amendment to existing legislation herewith submitted is to secure the sanction of law to the granting of passports to residents of our insular possessions, and thus enable this Government to extend to them a full measure of protection abroad.
>
> H.R. Rep. No. 559, 57th Cong., 1st Sess. 1 (1902); 35 Cong. Rec. 4992.

The Committee concluded its report with the following statement:

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"national" is defined as a citizen or a "non-citizen owing permanent allegiance to the United States." Id. § 51.1(d). "United States" is defined as the continental United States, the State of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, the Canal Zone, American Samoa, Guam and any other islands or territory over which the United States exercises jurisdiction. Id. § 51.1(a)

> The reasons for the necessity for the passage of this bill are so fully set forth in the letter from the Secretary of State that your committee does not deem it necessary to make further suggestions.

Id. at 2. Congressman Hitt, Chairman of the Foreign Affairs Committee, stated:

> . . . there is a body or class of persons . . . who owe allegiance to the United States, living in Porto (sic) Rico and other insular possessions, to whom it is our duty to afford protection, but who have not yet been decided to be citizens. In the bill presented that protection is authorized to be extended by diplomatic officers granting passports to those owing allegiance to the United States.
>
> 35 Cong. Rec. 4993 (1938).

The floor debate following the reading of the Committee's report indicates that the amendment was necessitated in part by the controversy, unresolved at the time, over whether the inhabitants of the newly acquired territories were citizens of the United States. 35 Cong. (sic) 4993-4994; 5697-5699

(1902).[33] In the absence of an agreement on that issue, the amendment was explicitly put forth by its backers as an expedient designed solely to facilitate the issuance of passports to those people.

> Mr. CLARK. . . . The situation, Mr. Speaker, is simply this: some of us believe that the very minute the Philippine Islands were annexed to the United States the people of those islands became citizens, as we had it stated here in the debate on the Porto (sic) Rican tariff; but there are a great many other people who do not believe anything of the sort, and it was necessary, in the judgment of the State Department and in the judgment of this committee, that some arrangement be made to grant a passport to these people in in the Philippine Islands and other islands that are hung up like Mohammed's coffin, between heaven and earth. But in order to avoid that

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33. Some members of the House believed that the language of the amendment clearly implied that inhabitants of the territories were not citizens, while the amendment's backers claimed that the language was deliberately ambivalent. The amendment apparently passed on the assumption that the "owes allegiance" provision was included only to cover such persons if it was ultimately determined that they were not citizens. See discussion infra.

> very difficulty of undertaking to decide whether they are citizens or not citizens, we used the language in the second section, which I have read, evading the whole thing.
>
> . . . if you support this bill, you will simply retain your political and constitutional integrity and at the same time allow the State Department to be authorized to issue passports to the Filipinos, whether it shall turn out ultimately that they are American citizens or not; and that is the reason this language is put in there--so that everybody here can vote for the bill and so that if a Filipino wants to go anywhere in the world before it is determined whether he is a citizen or not, he can, somehow or other, get a passport under the provisions of this bill.
>
> 35 Cong. Rec. 4993 (1938).

The floor debate also demonstrates that although the act, as finally amended, uses the term "allegiance," the bill originally referred to the committee contained the phrase "permanent allegiance". See H.R. 8129, 57th Cong. 1st Sess. (1902); 35 Cong. Rec. 4992 (1902). Some members of the House objected to this change on the ground that it might authorize the State Department to issue passports to aliens who owed only

"temporary" allegiance to the United States. 35 Cong. Rec. 5697-5698 (1902) (remarks of Congressman Smith).[34] Congressman Adams, the

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34. Congressman Smith stated:

"Now, my criticism upon the language proposed by the committee is that there are different kinds of allegiance owing to the Government. There is what is known as temporary allegiance, as well as that of permanent or unqualified allegiance. There are a great many people in this country who owe temporary allegiance to the United States who are not citizens of the United States. . . So that under this bill you propose to authorize the Secretary of State to issue passports to people who are not citizens of the United States and who do not owe permanent allegiance to its Government. So far as I am advised, there is not a government under the shining sun that undertakes to issue passports to people who are not citizens of that government. If you pass this bill, you place your Government in the attitude of authorizing passports to people who owe but temporary allegiance to your Government, because you use merely the expression 'allegiance,' whereas the Secretary of State used the expression 'permanent allegiance.'

"Now, as I said, I would be perfectly willing to accept the proposition of the Secretary of State. I believe that the residents of the Philippine Islands owe permanent allegiance to the Government of the United States, and, believing that, I would be willing to pass a law that would authorize the issue of passports to all persons who owe permanent allegiance to the United States. But you ask me to go further by your amendment; you ask me to vote for a proposition that will authorize the Secretary of State to issue passports to everybody that owes any kind of

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Foreign Affairs Committee's chief spokesman on the bill, insisted that that was not the Committee's intent and explained that the "allegiance" referred to by the bill was distinct from the allegiance owed to a sovereign by aliens temporarily residing in a country.

> Mr. ADAMS. In regard to the objection of the gentleman from Kentucky [Mr. SMITH] I would state that the word "permanent" is only an adjective; that all allegiance is permanent until it is broken by the Government or broken by the citizen. The word "permanent" does not reenforce the fact of allegiance. It is simply an adjective.
>
> . . . . .
>
> Mr. SMITH of Kentucky. If the gentleman will refer to the case of Radich v. Hutchins . . . and to the case of Carlisle v. The United States . . . he will see that the court says:
>
> > As a foreigner domiciled in the United States he was bound to obey all the laws of the United States not immediately relating to citizenship and was equally amenable with citizens to the penalties prescribed for their infraction. He

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(footnote continued)
allegiance to the Government of the United States, and I am unwilling to support that kind of a proposition." 35 Cong. Rec. 5098 (1902).

owed allegiance to that Government of the country so long as he was therein. So that there is such a thing as a temporary allegiance.

Mr. ADAMS. Mr. Speaker, passports are not issued to foreigners temporarily residing in any country.

Mr. SMITH of Kentucky. Yes; but you are proposing to pass a law that will authorize it.

. . . . .

Mr. ADAMS. Not at all. The kind of allegiance referred to in that case is what you may call a police allegiance, which simply is imposed on foreigners temporarily residing in any country, that they will be amenable to the laws and do no act that would bring discredit or warfare upon that country.

Mr. SMITH of Kentucky. It is a temporary allegiance.

Mr. ADAMS. That may be, but it is a specified kind, understood in international law between different countries, and has no reference to the allegiance due between the inhabitants of any country and the government thereof.

Mr. SMITH of Kentucky. Let me ask you this question: You authorize the issuing of a passport to anyone who owes allegiance to the United States. Now, does not that cover any kind of allegiance that a person may owe?

Mr. ADAMS. No, sir.

Mr. SMITH of Kentucky. Why does it not?

Mr. ADAMS. Simply because residents and inhabitants of a foreign country are never granted passports

in the country in which they temporarily reside.

Mr. SMITH of Kentucky. But if you pass this bill you authorize this Government to do so.

Mr. ADAMS. Then you will fall from the established rule that prevails in all nations of the world.

Mr. SMITH of Kentucky. Now, the gentleman knows that they can not secure passports at all under the law at present.

Mr. ADAMS. And they will not under this law. They are citizens of a foreign country temporarily residing, and they can not be granted passports and can not apply for them.

. . . . .

Mr. SMITH of Kentucky. You say the allegiance referred to in this bill is permanent?

Mr. ADAMS. Yes.

Id. at 5698.[35]

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35. The colloquy continued with the following exchange:

Mr. SMITH of Kentucky. What objection can there be to accepting the proposition of the Secretary of State, and saying "permanent?"

Mr. ADAMS. That is the Secretary's opinion but it adds no force. When this question was before the Committee the provision in this measure that the gentleman from Kentucky refers to was changed in the language of this bill so as to meet expressly the views

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We conclude from the legislative history of these various acts that Congress has used "allegiance" and "permanent allegiance" interchangeably and that, as used in these acts, both terms refer exclusively to those people "hung . . . between heaven and earth" in America's overseas possessions. The use of the phrase "owes allegiance in the appropriation act, as shown by an examination of its own legislative history, is consistent with this general usage. Congress intended to restrict federal employment to citizens and inhabitants of our territorial possessions when it enacted the appropriation acts for

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(footnote continued)

> of gentlemen on that side of the Chamber, and every member of the committee was perfectly satisfied with this bill. It is a unanimous report, and when it was discussed before the arguments in favor of this bill were made entirely by gentlemen on that side of the Chamber, as we thought it was the better way. Now, Mr. Speaker, I call for a vote on the bill.

1938, and nothing in the legislative history of subsequent appropriation acts suggests that Congress at any time assigned a different meaning to the "owes allegiance" provision.[36]

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36. When the Independent Offices Appropriation Act, 1944, Publ. L. 78-90, 57 Stat. 169 (1943) was before the Senate in May of 1943, the following colloquy took place.

> Mr. GILLETTE. Mr. President, I should like to ask the distinguished Senator in charge of the bill what class of persons is included in the third category-
>
> (3) is a person who owes allegiance to the United States.
>
> What persons, besides citizens and persons who have filed declarations of intention to become citizens, owe allegiance to the United States?
>
> Mr. McKELLAR. Section 205 as passed by the House seemed to members of the Senate committee to need clarification. The amendment which the Senate committee added was for the purpose of clarifying the language of the House bill. It did not change it, as we understood it. It appears that no suggestion was made as to the definition of a person who owes allegiance to the United States. I am in doubt about it myself.
>
> This language has been carried in the law for a number of years, and we left it there. I am not sure what it means.
>
> Mr. GILLETTE. I cannot conceive of any person who is not a citizen and who has not filed a declaration of

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Finally, the Court notes that neither the Committee Reports nor the floor debates concerning the first adoption of the "affidavit provision" in the Independent Offices Appropriation Act, 1944, Pub. L. No. 78-90, 57 Stat. 169, 196 (1943), sheds any light on the meaning of the term "allegiance". See 89 Cong. Rec. 1074-1075; 4786; 4967-4968; 5935-5936 (1943). Insofar as it relates to the "owes allegiance" provision, the affidavit

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> intention to become a citizen, who owes allegiance to the United States.
>
> Mr. McKELLAR. Possibly it refers to a person from the Philippine Islands, the Virgin Islands, or Puerto Rico, who owes allegiance.
>
> Mr. McNARY. Mr. President. I think this amendment comes under the head of controversial amendments, and I ask that it go over.
>
> Mr. McKELLAR. Very well.
>
> THE PRESIDING OFFICER (Mr. MAYBANK in the chair). Without objection, the amendment will be passed over.

89 Cong. Rec. 4786 (1943). The amendment referred to is not relevant to this discussion. Although the Senate ultimately passed the bill as amended, 89 Cong. Rec. 4968 (1943), the Court has found no further discussion of the "owes allegiance" provision.

referred to in § 699b and its predecessor acts merely enables a government agency or department to employ a person who claims to be a non-citizen national without conducting an independent inquiry into that person's true status. See 89 Cong. Rec. 4967 (remarks of Senator Overton).

Ms. Yuen admittedly is not a non-citizen national of the United States. Since we find that she is not eligible for federal employment under the appropriation act, we turn next to plaintiff's claim that that statute deprives her of equal protection of the law.

III. The Equal Protection Issue

Plaintiff claims that "the distinction made by the Appropriations Act between aliens who can be compensated and aliens who cannot, is unconstitutional" and denies her equal protection of the law. (Memorandum of Law in Support of Issuance of Preliminary Injunction at 6). Apparently arguing that either "strict scrutiny" or some intermediate standard

of review applies here,[37] plaintiff contends that "[n]either the face of the statute nor [its] legislative history . . . discloses any 'overriding national interest' which would justify preferring some aliens over others for federal employment on the basis of national origin." (Plaintiff's Further Memorandum of Law at 26). The government, on the other hand, urges that the "wholly irrational"[38]

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37. Initially, plaintiff "acknowledged" that § 699b "must be sustained unless 'wholly irrational,'" but at the same time sought to preserve her right to argue on appeal that a stricter standard of review should apply. (Memorandum of Law in Support of Issuance of a Preliminary Injunction at 7). At the June 16, 1980 oral argument, however, the Court informed plaintiff that such a procedure would be inconsistent with the interest of enabling an appellate court to derive whatever benefit it could from this Court's consideration of the issue. (Trans. at 11-12). Plaintiff now asserts that the "wholly irrational" standard is inapplicable to the facts of this case. (Plaintiff's Further Memorandum of Law at 25-26).

38. Although the Court used the phrase "wholly irrational", the standard employed in Mathews appears to be the "rational relationship test," which requires that the government demonstrate that the classification involved is rationally related to a legitimate government interest. See Olegario v. United States, supra, at 228-229.

standard applied in Mathews v. Diaz, 426 U.S. 67, 83, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976), is appropriate here but contends that "under any standard," the interests asserted are sufficient to validate the citizenship requirement challenged in this proceeding. (Memorandum of Law in Opposition To Plaintiff's Motion For A Preliminary Injunction at 12). Although we conclude that an "intermediate" standard of review is appropriate in this case, see e.g., Petition for Naturalization of Antonio Olegario v. United States, 629 F.2d 204 (2d Cir. 1980); Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Calif. 1977) (Hampton II), we hold that the "important" federal interests in providing an incentive for aliens to become naturalized and in providing Congress or the President with the ability to use eligibility for federal employment as a foreign policy tool, are "substantially furthered" by, and are thus sufficient to uphold, the classification scheme established by § 699b.

A. The Applicable Standard of Review

We begin our analysis of plaintiff's equal protection claim with the recognition that although state classifications based on alienage are "inherently suspect" and subject to strict judicial scrutiny, see e.g., Nyquist v. Mauclet, 432 U.S. 1, 97 S. Ct. 2120, 53 L.Ed.2d 63 (1977); Sugarman v. Dougall, 413 U.S. 634, 93 S. Ct. 2842, 37 L.Ed.2d 853 (1973); In re Griffiths, 413 U.S. 717, 93 S. Ct. 2851, 37 L.Ed.2d 910 (1973); Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971); but see, Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589, 60 L.Ed.2d 49 (1979); Foley v. Connelie, 435 U.S. 291, 98 S. Ct. 1067, 55 L.Ed.2d 287 (1978), "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." Mathews v. Diaz, 426 U.S. at 87, 96 S. Ct. at 1895. Plaintiff is of course protected by the Fifth Amendment's implicit guarantee of equal

justice under the law. In the context of "selective federal legislation," however, "there may be overriding national interests which justify [such] . . . legislation that would be unacceptable for an individual state." Hampton I, 426 U.S. at 100, 96 S. Ct. at 1904. Indeed, as a result of the "paramount federal power over immigration and naturalization", id., courts have consistently applied a more relaxed standard when evaluating federal classifications based on alienage.[39] See e.g., Mathews v. Diaz, supra.

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39. The rationale underlying the limited character of judicial review in this context was described in Mathews v. Diaz, 426 U.S. at 81-82, 96 S. Ct. at 1892 (footnotes omitted):

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more

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(applying a "wholly irrational" standard and upholding a federal regulation denying certain Medicare benefits to aliens who had not been admitted for permanent residence in the United States and had not resided here for at least five years); Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980) (recognizing the "limited" scope of judicial review and upholding a regulation revoking deferred departure dates previously granted to Iranian nationals); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, __U.S.__, 100 S. Ct. 2928, 64 L.Ed.2d 815 (1980) (applying a rational basis standard and upholding a regulation applying only to Iranian nationals); Letourneau v. Califano, 453 F. Supp. 636 (S.D.N.Y. 1978) (3 Judge Court)

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(footnote continued)

> appropriate to either the Legislature or the Executive than to the Judiciary . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

(applying a "minimum scrutiny" standard and upholding statutes granting certain social security benefits to citizens working for foreign governments or international organizations but not to similarly situated permanent resident aliens), appeal dismissed, 444 U.S. 805, 100 S. Ct. 26, 62 L.Ed.2d 18 (1979); Lopez v. Bergland, 448 F. Supp. 1279 (N.D. Calif. 1978) (3 Judge Court) (applying a rational basis standard and upholding a federal statute limiting eligibility for federal farm operating loans to citizens). See also, Olegario v. United States, supra, (applying an intermediate standard and upholding the constitutionality of the withdrawal in 1945 of a naturalization examiner from the Philippines.)

The exercise of the federal power over immigration and naturalization has thus traditionally been accorded minimum judicial scrutiny. See Hampton II at 43. Nevertheless,

Hampton I at least suggests that something more than mere rationality must be satisfied when federal action deprives an alien of a liberty interest. 426 U.S. at 102-103, 96 S. Ct. at 1904-1905. Although the Court did not explicitly enunciate a standard of review, it noted that

> "[W]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." Id.

The Court invalidated the CSC rule because it was neither mandated by the President or

Congress nor predicated on any legitimate interest of the Commission,[40] but the Court also assumed without deciding that the "national interest in providing an incentive for aliens to become naturalized, or possibly even [the interest in] . . . providing the President with an expendable token for treaty negotiating purposes" would adequately support an explicit determination by Congress or the President to exclude all non-citizens from federal employment. Id. at 105, 116, 96 S. Ct. at 1904, 1905.

Three months after the decision in Hampton I, President Ford issued an Executive Order providing for the exclusion of aliens from the competitive Civil Service, thereby effectively reinstating the prior CSC regulation. Exec. Order No. 11935, 5 C.F.R. § 7.4 (1974). The constitutionality of that order was upheld on remand in Hampton II as well as in the face of similar equal protection challenges by alien plaintiffs in Vergara v.

40. See footnotes 12-13 and accompanying text supra.

Hampton, 581 F.2d 1281 (7th Cir. 1978), cert. denied 441 U.S. 905, 99 S. Ct. 1993, 60 L.Ed.2d 373 (1979), and Ramos v. Civil Service Commission, 430 F. Supp. 422 (D.P.R. 1977) (3 Judge Court). Both Vergara and Ramos relied heavily on the "assumption" in Hampton I and applied what appears to be a mere rationality standard. Hampton II, however, rejected mere rationality and held that, after Hampton I, "when the federal government seeks to sustain a rule discriminating against noncitizens in a manner which would violate equal protection if adopted by a state, it must demonstrate that the rule substantially furthers important federal interests in the regulation of immigration and naturalization." 435 F. Supp. at 44. The court upheld the Executive Order because it substantially furthers the federal government's "unique" interest in encouraging naturalization in a manner which also furthered the government's interest in the efficiency of

of the civil service. In Jalil v. Campbell, 590 F.2d 1120, 1123 n.3 (D.C. Cir. 1978), the court explicitly indicated its "general agreement with the reasoning and conclusion" of Hampton II.[41] We believe that Hampton II articulates the correct standard of review for the equal protection issue in this case.

Like Hampton I and in contrast to Mathews v. Diaz, supra, the government action challenged here deprives plaintiff and other similarly situated aliens of an interest in liberty. See Hampton I, 426 U.S. at 102-103, 96 S. Ct. at 1904-1905 (characterizing ineligibility for employment in a "major sector of the economy" as a deprivation of an interest in liberty); Hampton II at 43. The appro-

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41. In Jalil, a naturalized citizen who had challenged the CSC's citizenship requirement while still an alien sought back pay and affirmative hiring relief.

priation act's eligibility requirements, moreover, are not directly related to the admission, exclusion or deportation of aliens. Under such circumstances, it is at least arguable that federal classifications affecting aliens should be subjected to some greater degree of judicial scrutiny. See e.g., Rosberg, "The Protection of Aliens From Discriminatory Treatment By The National Government," 1977 Sup. Ct. Rev. 275, 324-336. But see, e.g., Mathews v. Diaz, supra. We thus turn to an analysis of the government interests asserted in light of the standards set forth in Hampton I and Hampton II.

B. The Equal Protection Analysis

The appropriation act limits eligibility for federal employment to aliens who are citizens of a specified group of foreign countries. The government contends that the statute, particularly the provision exempting nationals of countries "allied with the United States in the current defense effort," pro-

vides the President with "a bargaining chip . . . in negotiating defense alliances . . .." (Memorandum of Law In Opposition To Plaintiff's Motion For A Preliminary Injunction at 13). See also, Hampton I, 426 U.S. at 105, 96 S. Ct. at 1906. In addition, although not raised by the government, the combination of a citizenship requirement with specific exemptions also provides Congress with an expendable foreign policy token: under the statute, Congress may, as it sees fit, bestow the benefit of eligibility for federal employment upon, for example, citizens of friendly nations, or political refugees. We have little doubt that these foreign policy interests are "unique to the federal government and capable of supporting a degree of federal legislation beyond that permissible to the states." Hampton II at 45. Moreover, although there is no clear evidence that Congress acted in furtherance of these interests when it enacted either the citizenship requirement or the specific exemptions,

we may "presume that any interest which might rationally be served by the [Congressional] rule did in fact give rise to its adoption." Hampton I, 426 U.S. at 103, 96 S. Ct. at 1905. See also, Olegario v. United States, supra, at 232. Since it is not our role to question the wisdom of using employment eligibility to serve foreign policy goals, see Narenji v. Civiletti, 617 F.2d at 748, the only remaining question is whether the "bargaining chip" or "token" interests are "substantially furthered" by the eligibility scheme set forth in the appropriation act.

The appropriation act in its current form appears as if it was specifically tailored for the "bargaining chip" and "token" interests.[42] More significantly, a rule of

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42. Over the years, Congress has exempted specified groups of aliens from the act's citizenship and "owes allegiance" requirements. In 1943, "nationals of those countries allied with the United States in the prosecution of the war" were exempted. Independent Offices Appropriation Act, 1944, Pub. L. No.

(footnote continued on next page)

law qualifying all aliens for federal employment would eliminate the ability of either Congress or the President to utilize eligibility

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(footnote continued)
78-90, 57 Stat. 169, 196 (1943). This exemption was subsequently changed to read "nationals of those countries allied with the United States in the current defense effort." Supplemental Appropriation Act, 1952, Pub. L. No. 82-253, 65 Stat. 736, 755 (1951). Permanently admitted aliens from the Baltic countries were exempted in 1953. Supplemental Appropriation Act, 1954, Pub. L. No. 83-207, 67 Stat. 418, 435 (1953). In 1961, aliens from Poland who were lawfully admitted to the United States for permanent residence were exempted. General Government Matters, Department of Commerce and Related Agencies Appropriation Act, 1962, Pub. L. No. 87-125, 75 Stat. 268, 282 (1961). Cuba was added to the list in 1973. Treasury, Postal Service, and General Government Appropriation Act, 1974, Pub. L. No. 93-143, 87 Stat. 510, 524 (1973). At the request of the State Department, the employment of refugees from South Vietnam was permitted in 1975. Treasury, Postal Service, and General Government Appropriation Act, 1976, Pub. L. No. 94-91, 89 Stat. 441, 458 (1975). Cambodian and Laotian refugees paroled into the United States were exempted in 1978. Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95-429, 92 Stat. 1001, 1015 (1978). Finally, in 1979, the appropriation act was altered so as not to be applicable to citizens of Israel. Treasury, Postal Service, and General Government Appropriations Act 1980, Pub. L. No. 96-74, 93 Stat. 559, 574 (1979).

for such employment as a foreign policy tool. See e.g., Yassini v. Crosland, 618 F.2d at 1360 ("A rule of law that would inhibit the flexibility of the political branches [in the foreign policy area] should be adopted only with the greatest caution . . .") While Congress could perhaps have adopted a more inclusive classification scheme which would have preserved that ability without excluding plaintiff and similarly situated aliens, we decline to substitute our judgment for Congress' in that regard.

The government also contends that § 699b substantially furthers the federal interest in encouraging naturalization. Within limits, we agree that this interest too is important enough to justify federal action regarding aliens that would be impermissible to the states.[43] Hampton II, at 45. See also,

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43. The kind of action the federal government can take in furtherance of this interest is obviously limited by the due process clause.

Hampton I, 426 U.S. at 116, 96 S. Ct. at 1911. We also agree with Chief Judge Peckham's conclusion in Hampton II that this interest is substantially furthered by an exclusion from federal employment of aliens eligible for citizenship, but that a blanket exclusion without regard to such eligibility furthers important federal interests only if we consider the interest in administrative efficiency as well as the interest in encouraging naturalization. Id. at 45-46. In the context of this case, we note, finally, that Congress' decision, perhaps in furtherance of the foreign policy interests already discussed, to confer a benefit on some aliens/potential citizens but not on others, does not detract from the fact that the statute as drawn substantially furthers the federal interest in encouraging naturalization.

We conclude that the classification scheme established by Congress substantially furthers "sufficiently important" federal

interests to satisfy the appropriate constitutional standard of review.[44]

Summary judgment in favor of the defendants is granted.

So ordered.

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44. The government also contends that "the preservation of employment opportunities for American citizens . . . [is] a valid basis for the statute at issue . . ." and that "[a]s significant unemployment continues to prevail in the United States, it is plain that the citizenship requirement for federal employment is not wholly irrational." (Defendant's Supplemental Memorandum at 12). The government has not stressed this point, however, and in view of our finding that the statute is supported by other federal interests, we see no reason to address the question here.

# Opposition

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CLERK

No. 81-359

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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VERONICA YUEN, PETITIONER

*v.*

INTERNAL REVENUE SERVICE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an alien who takes an oath of allegiance to the United States is "a person who owes allegiance to the United States" within the meaning of 31 U.S.C. (Supp. III) 699b.

2. Whether 31 U.S.C. (Supp. III) 699b violates the Due Process Clause of the Fifth Amendment.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 649 F.2d 163. The opinion of the district court (Pet. App. A13-A75) is reported at 497 F. Supp. 1023.

### JURISDICTION

The judgment of the court of appeals was entered on May 21, 1981. On August 18, 1981, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 18, 1981. The petition for a writ of certiorari was filed

on August 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

31 U.S.C. (Supp. III) 699b provides:

> Unless otherwise specified during the current fiscal year no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on September 29, 1979, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, (4) is an alien from Cuba, Poland, South Vietnam, or the Baltic countries lawfully admitted to the United States for permanent residence, or (5) South Vietnamese, Cambodian and Laotian refugees paroled into the United States between January 1, 1975, and September 29, 1979: *Provided*, That for the purpose of this section, an affidavit signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his status have been complied with: *Provided further*, That any person making a false affidavit shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penal-clause shall be in addition to, and not in substitution for any other provisions of existing

law: *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of Israel, the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

## STATEMENT

A statutory provision entitled "Citizenship requirement for federal employees compensated from appropriated funds" (hereinafter referred to as the "Appropriations Act"), which is codified at 31 U.S.C. (Supp. III) 699b, prohibits the compensation from appropriated funds of noncitizens, with certain specified exceptions. In addition, Exec. Order No. 11935, 41 Fed. Reg. 37301 (1976), issued on September 2, 1976, imposes a citizenship requirement for most positions in the competitive civil service.

In April 1980, petitioner, a permanent resident alien, applied for a position as a legal research assistant at the Internal Revenue Service (Pet. App. A18). This position was an "excepted" position, *i.e.*, not part of the competitive civil service, and hence not subject to the limitations of Exec. Order No. 11935 (*id.* at A13-A14 n.1). However, because petitioner did not fall within any of the eligible categories in the Appropriations Act, she was denied the position.[1]

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[1] Petitioner was offered the job, but the offer was rescinded several hours later when a personnel officer learned that petitioner was ineligible for compensation under the Appropriations Act (Pet. App. A19-A20).

In June 1980, petitioner commenced this action in the United States District Court for the Southern District of New York seeking $10,000 in damages and an injunction compelling the IRS to hire her. Petitioner argued that, because she had taken an oath of allegiance to the United States shortly after this action was brought (see Pet. App. A14 n.2), she was eligible for the IRS position as "a person who owes allegiance to the United States" under 31 U.S.C. (Supp. III) 699b. Alternatively, petitioner argued that, if she was not eligible for compensation under the Appropriations Act, the Act violated the Due Process Clause of the Fifth Amendment.

The district court granted the government's motion for summary judgment (Pet. App. A13-A75). After thoroughly reviewing the pertinent legislative history of the Appropriations Act, as well as the legislative history and judicial construction of other statutes employing similar language, the district court concluded that the "owes allegiance" provision of the Act was intended to apply only to noncitizen nationals of the United States, who owe "permanent allegiance" to the United States as inhabitants of its territorial possessions (*id.* at A30-A58). The district court also concluded that the classifications in the Appropriations Act do not violate the Fifth Amendment because they advance important federal interests in foreign policy and encouraging naturalization (*id.* at A59-A75).

Relying largely on the district court's opinion, the court of appeals affirmed (Pet. App. A1-A12).

## ARGUMENT

As petitioner concedes (Pet. 7), the court of appeals' decision is "the only reported opinion interpreting the Appropriations Act," and accordingly it does not conflict with any decision of this Court or another court of appeals. Moreover, the decisions below exhaustively analyze the legislative history of the Act in reaching a correct result. Further review by this Court is therefore unwarranted.

1. Petitioner contends (Pet. 8-15) that she qualifies as "a person who owes allegiance to the United States" within the meaning of the Appropriations Act, simply because she executed an affidavit swearing allegiance to the United States. Petitioner does not contend in this Court that this interpretation is consistent with the intent of Congress. As both courts below explained (Pet. App. A9-A11, A37-A58), the legislative history conclusively establishes that Congress intended the "owes allegiance" exemption to cover persons who owe "permanent" allegiance to the United States as inhabitants of its territorial possessions, not any alien who takes an oath of allegiance. Rather, petitioner asserts that this Court's decision in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 109 (1976), held that the Appropriations Act exemption covers any alien who takes an oath of allegiance, and hence an inquiry into congressional intent is now foreclosed.

a. The suggestion that any alien may qualify as exempt from the restrictions on federal employment under 31 U.S.C. (Supp. III) 699b, is at odds with the statutory scheme. The statute generally attempts to restrict eligibility for compensation for federal employment to persons with a specific affinity to the United States, such as citizenship, or to special groups of aliens on whom the benefit of eligibility

is bestowed (see Pet. App. A35-A36). Apart from the exemption for citizens, most of the other statutory exemptions would be superfluous if any alien could become exempt simply by taking an oath of allegiance. See, *e.g.*, 31 U.S.C. (Supp. III) 699b(2), (4), (5) (persons "in the service of the United States" who declare their intention to become citizens, and aliens and refugees of certain nationalities). Rather, the recent exemptions for aliens from specified countries, such as the 1978 exemption for Cambodian and Laotian refugees, reflect Congress' understanding that these special provisions were necessary to create eligibility for federal employment—an understanding inconsistent with petitioner's view that any alien can become eligible by taking an oath of allegiance. See Pet. App. A11. Moreover, the legislative discussion concerning the adoption of the "owes allegiance" provision in 1938 makes clear that Congress intended the provision to apply only to inhabitants of territorial possessions of the United States, who "owe[] allegiance" to the United States even though they are not citizens. See generally Pet. App. A37-A43.

b. Nor is there any merit to petitioner's contention that *Hampton* v. *Mow Sun Wong*, *supra*, holds that aliens who take an oath of allegiance are persons who "owe[] allegiance" to the United States within the meaning of the Appropriations Act. In *Hampton*, several resident aliens challenged the constitutionality of a Civil Service Commission regulation that, with minor exceptions, restricted civil service appointments to candidates who were citizens of or "owe[d] permanent allegiance to the United States." 5 C.F.R. 338.101 (1976); see 426 U.S. at 90 n.1. This Court held that the citizenship requirement was invalid under the Due Process Clause

because, although it might be justified by certain national interests in foreign policy and naturalization that are the concern of Congress and the President, it was not "justified by reasons which are properly the concern of [the Civil Service Commission]." 426 U.S. at 116.

In the course of its decision, the Court reviewed the extent to which the Commission's policy had been "given consideration by Congress or the President" in order to decide whether their acquiescence in the policy "should give the Commission rule the same support as an express statutory or Presidential command." 426 U.S. at 105. The Court observed that Congress, in a series of appropriations acts that were predecessors to 31 U.S.C. (Supp. III) 699b, had authorized compensation from appropriated funds to a much broader class of potential employees than those eligible under the Commission's regulation. 426 U.S. at 108-109.[2] In this context the Court made the statement on which petitioner relies (*id.* at 109):

> Congress has regularly provided for compensation of any federal employee owing allegiance to the United States. Since it is settled that aliens may take an appropriate oath of allegiance [citing *In re Griffiths*, 413 U.S. 717, 726 n.18

[2] The Court noted that, in addition to citizens, Congress had authorized payment to: persons owing allegiance to the United States; persons already employed in the service of the United States; persons whose skills were needed because citizens with requisite experience and qualifications were not available; aliens eligible for citizenship who had filed a declaration of intention to become a citizen; certain Coast Guard veterans who were ineligible for United States citizenship; citizens of the Commonwealth of the Philippines; nationals of those countries allied with the United States in the prosecution of the war; and permanently admitted aliens from the Baltic countries. 426 U.S. at 108-109.

> (1973)], the statutory category, though not precisely defined, is plainly more flexible and expansive than the Commission rule.

This statement clearly does not constitute a holding by this Court that the phrase "owes allegiance" in the Appropriations Act includes any alien who takes an oath of allegiance. The Court's discussion of the "owes allegiance" provision was merely an illustration of an obvious point not in contention between the parties—that the Appropriations Act authorized the compensation of a broader class of noncitizens than did the challenged Civil Service regulation. This statement about the coverage of the Appropriations Act is true under the interpretation given by the courts below to the "owes allegiance" provision, as well as under petitioner's interpretation. The Court was presented with no issue that required interpretation of that provision.[3] Thus, the Court was content to conclude that the provision was "not precisely defined." Indeed, immediately after the statement relied upon by petitioner, the Court expressly acknowledged that its statement was dictum (*id.* at 109-110):

> Nevertheless, for present purposes we need merely conclude that the Appropriations Act[] cannot fairly be construed to evidence either congressional approval or disapproval of the specific Commission rule challenged in this case.

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[3] The Court stated that the question presented in *Hampton* was " '[w]hether a regulation of the United States Civil Service Commission that bars resident aliens from employment in the federal competitive civil service is constitutional." 426 U.S. at 98-99. Neither the parties nor the amici curiae addressed in their briefs the meaning of the "owes allegiance" provision. See Pet. App. A9.

Petitioner mistakenly asserts (Pet. 14) that the statutory question as to the meaning of the "owes allegiance" provision "was clearly decided [in *Hampton*] since the *Hampton* plaintiffs in fact had standing only to challenge the impermissible narrowing of the 'owes allegiance' provision."[4] As resident aliens seeking federal employment, all of the plaintiffs in *Hampton* had standing to challenge the Civil Service Commission regulation barring resident aliens from such employment. Indeed, because several of the plaintiffs in *Hampton* had never taken an oath of allegiance to the United States, it would appear that the only issue that all plaintiffs had standing to raise was the one identified by the Court (426 U.S. at 98-99)—whether the Civil Service Commission constitutionally could promulgate a regulation barring the employment of aliens. As the court of ap-

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[4] Petitioner assumes (Pet. 14) that the *Hampton* plaintiffs were not eligible for compensation under the Appropriations Act unless petitioner's interpretation of the "owes allegiance" provision is correct. As nationals of China in 1976, however, the *Hampton* plaintiffs may have come within the exemption in the Act for "nationals of those countries allied with the United States in the current defense effort." That question was never raised or litigated in *Hampton*. Whatever the status of Chinese nationals was in 1976, however, it is clear that today Chinese nationals, such as petitioner, no longer qualify for the exemption. In a Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, issued on December 15, 1978, the President announced the recognition by the United States of the government of the People's Republic of China as the sole legal government of China. Thus, petitioner would be considered a national of the People's Republic of China, a country that is not allied with the United States in the current defense effort. Cf. *Matter of Cheung*, 16 I. & N. Dec. 690 (1979).

peals pointed out (Pet. App. A9), the fact that the *Hampton* Court drew no distinction among the plaintiffs, even though only two of them had taken an oath of allegiance, makes clear that the Court's decision in no way rested on an interpretation of the "owes allegiance" provision. Thus, the decision below is fully consistent with this Court's decision in *Hampton*.[5]

Finally, there is no merit to petitioner's contention (Pet. 11-13) that Congress, by its inaction, acquiesced in the *Hampton* discussion of the "owes allegiance" provision. In issuing the Executive Order barring the hiring of aliens for competitive civil service positions, President Ford stated that *Hampton* had invalidated "the Civil Service Commission's *general* prohibition against the employment of aliens" (41 Fed. Reg. 37303 (1976); emphasis added), and there is no evidence that Congress or the President understood *Hampton* to have interpreted the Appropriations Act. On the contrary, as noted above, the congressional debate concerning a post-*Hampton* amendment to the Appropriations Act, which created a special exemption for Cambodian and Laotian ref-

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[5] The decision of the court of appeals similarly does not conflict with this Court's decision in *In re Griffiths*, 413 U.S. 717, 726 n.18 (1973). Cf. *Hampton* v. *Mow Sun Wong*, *supra*, 426 U.S. at 109 n.39. In *Griffiths*, this Court held only that a noncitizen may in good faith take an oath to support the Constitution. Even assuming that such an oath may be equated with an oath of allegiance, *Griffiths* is inapposite. As the court of appeals observed (Pet. App. A10):

> The proposition that an alien may in good faith take an appropriate oath of allegiance to the United States * * * does not compel the conclusion that Congress intended a conclusory oath to suffice to establish an alien as a person who "owes allegiance" to the United States, for purposes of federal employment.

ugees, reveals Congress' understanding that an alien may not become eligible for federal employment simply by taking an oath of allegiance. See 124 Cong. Rec. H11439 (daily ed. Oct. 4, 1978) (remarks of Rep. Steed).

2. Petitioner also contends (Pet. 16-24) that the Appropriations Act, as construed by the courts below, discriminates among aliens on the basis of national origin in violation of the Due Process Clause of the Fifth Amendment.[6] This contention is insubstantial.

In *Hampton*, this Court recognized that a citizenship requirement for federal employment could "be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." 426 U.S. at 105. In line with this position, every court that has considered the question has concluded that the citizenship requirement promulgated by Exec. Order No. 11935 is constitutional. *Mow Sun Wong* v. *Campbell*, 626 F.2d 739 (9th Cir. 1980), cert. denied, No. 80-5824 (Feb. 23, 1981); *Jalil* v. *Campbell*, 590 F.2d 1120 (D.C. Cir. 1978); *Vergara* v. *Hampton*, 581 F.2d 1281 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Santin Ramos* v. *United States Civil Service Commission*, 430 F. Supp. 422 (D.P.R. 1977).

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[6] Since the term "national origin" ordinarily refers to the country from which an individual or his ancestors came, rather than the country of his citizenship (see *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973)), we understand petitioner to contend that the Appropriations Act unconstitutionally discriminates among aliens on the basis of nationality.

Petitioner does not seriously contest the constitutionality of a blanket prohibition on aliens in federal employment (see Pet. 18-19). Rather, she contends (*id.* at 20-24) that the statute is constitutionally deficient because of the way it discriminates among various groups of aliens. Specifically, petitioner assumes (*id.* at 22) that restrictions on federal employment of aliens may serve bona fide foreign policy interests, such as providing a bargaining chip for the President in treaty negotiations or providing Congress with an expendable foreign policy token, but she argues that the particular classifications that Congress has adopted in the Appropriations Act are either underinclusive, overinclusive, or otherwise ill-designed to accomplish the congressional purpose (*id.* at 22-23).[7]

These details of foreign policy, however, are matters that have been entrusted to the political branches of the government. As this Court has observed, "[a]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). While it can be argued that Congress should have drawn the line with respect to eligibility of different groups of aliens at a different point, it is clear that the classifications in the Appropriations

[7] For example, petitioner asserts (Pet. 22) that federal employment should be made available to aliens from Czechoslovakia if it is made available to aliens from Poland.

Act serve important congressional objectives,[8] and the courts are not empowered to substitute their political judgment for that of Congress. See *Fiallo* v. *Bell*, 430 U.S. 787, 798 (1977). The courts have upheld congressional distinctions among groups of aliens in a variety of contexts. See, *e.g.*, *Mathews* v. *Diaz*, *supra* (eligibility for Medicare benefits); *Olegario* v. *United States*, 629 F.2d 204, 231-233 (2d Cir. 1980) (eligibility for naturalization); *Yassini* v. *Crosland*, 618 F.2d 1356 (9th Cir. 1980) (revocation of deferred departure dates for Iranian nationals); *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (reporting requirements for Iranian nationals). By the same token, the alienage classifications of 31 U.S.C. (Supp. III) 699b do not violate the Fifth Amendment.[9]

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[8] As the courts below recognized (see Pet. App. A12, A69-A75), the Appropriations Act encourages the naturalization of persons not otherwise eligible for federal employment and furthers the exercise of foreign policy by exempting from the citizenship requirement nationals of those countries that Congress deems deserving of special consideration.

[9] It is well established that Congress may impose citizenship requirements consistent with the Fifth Amendment that would be forbidden to the states. See *Nyquist* v. *Mauclet*, 432 U.S. 1, 7 n.8 (1977); *Hampton* v. *Mow Sun Wong*, *supra*, 426 U.S. at 101. This Court has explained that decisions made by Congress or the President in the area of immigration and naturalization are subject to "a narrow standard of review." *Mathews* v. *Diaz*, *supra*, 426 U.S. at 81-82. Even assuming that an intermediate, more exacting standard of review is appropriate here, both courts below correctly concluded that 31 U.S.C. (Supp. III) 699b is constitutional. See Pet. App. A12, A59-A60.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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